U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 March 2003

Case No: 2001-ERA-33

In the Matter of

CRAIG H. FRITTS

Complainant

v.

INDIANA MICHIGAN POWER COMPANY

Respondent

APPEARANCES:

John T. Burhans, Esq.
BURHANS LAW OFFICES
St. Joseph, Michigan

For Complainant

Thomas A. Schmutz, Esq.
MORGAN, LEWIS, & BOCKIUS LLP
Washington, D.C.

For Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of discrimination filed pursuant to Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 *et. seq*. The ERA affords protection from employment discrimination for employees of Nuclear Regulatory Commission (NRC) licensees who engage in activity that effectuates the purpose of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, et. seq. Specifically, the law protects "whistleblower" employees from retaliatory or discriminatory actions by the employer. 42 U.S.C. § 5851(a)(1).

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes and case law. They are also based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

References to "CX" and "RX" refer to the exhibits of the Complainant and Respondent respectively. "JX" refers to Joint Exhibits, and "ALJX" refers to Administrative Law Judge Exhibits. The transcript for the hearing is cited as "Tr." and by page number.

POSITIONS OF THE PARTIES

Craig H. Fritts (hereinafter "Complainant" or "Fritts") contends that internal complaints to his supervisors were "protected activity" under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 *et. seq*. He also alleges that Respondent discriminated against him because of his protected activity by terminating him on December 8, 2000.

It is Respondent's position that Complainant did not engage in protected activity. If Complainant's activities are found to be protected, Respondent asserts that no nexus exists between the protected activity and the adverse employment action as Complainant was terminated solely for poor performance.

PROCEDURAL HISTORY

Complainant was employed by Indiana Michigan Power Company (hereinafter "Respondent" or "I&M"), a subsidiary of American Electric Power Company, from April 1999 until his termination on December 8, 2000. Fritts filed a complaint with the Department of Labor alleging that he was discriminated against for raising safety concerns regarding the schedule to achieve compliance with NRC regulations. His complaint was denied on June 25, 2001 by the

Office of Safety and Health Administration (hereinafter "OSHA"), and Fritts appealed that ruling and requested a formal hearing on June 27, 2001. The complainant's allegation of discrimination under Section 211 of the ERA was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held in South Bend, Indiana, from March 12, 2002 until March 14, 2002, and from April 30, 2002 until May 3, 2002.

ISSUES

1. Whether Complainant engaged in protected activity by:

   (a) Concurring in a September 1, 2000 Condition Report regarding deficiencies in the plant's Maintenance Rule Program preventing compliance;

   (b) Bringing concerns to supervisors that the scope represented in the Condition Report was too narrow;

   (c) Expressing quality concerns to management about an inadequate schedule and lack of resources to produce a quality Maintenance Rule Program;

   (d) Creating and sending a memorandum which expressed concerns about inadequate budget and resources for the Maintenance Rule Program;

   (e) Requesting expansions of time and content in the log review for the Maintenance Rule access database; and

   (f) Removing the Maintenance Rule access database from usage in order to correct the database due to concerns for quality;

2. Whether Complainant was discriminated against by Indiana Michigan Power Company as the result of his having been fired on December 8, 2000; and

3. Whether Complainant need only demonstrate that his protected activity was a contributing factor in his termination either alone or in connection with other factors.

CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of eleven witnesses.

I find the testimony of Joel P. Gebbie, Patricia A. Phoenix, Martin Dixon, and James A. Kobyra all to be credible.

I find the testimony of Lawrence Bossinger to also be entirely credible. Bossinger's testimony regarding employee evaluation and termination procedures in general and specifically in reference to Complainant was honest and thorough.

I find Eric Ballon's testimony to be credible. He testified about the technical aspects of the work he performed with Complainant as well as the expectations and operations of plant management. He was a forthright and independent witness.

I find Dominick So's testimony to be credible. Although he appeared to harbor animosity toward I&M over his own adverse personnel action at the same plant, his testimony was consistent and honestly given.

Lanny Thornsberry testified as to his recollection of the events from October to December 2000 and the work performed in furtherance of Maintenance Rule compliance. I find his testimony to be honestly given and credible.

William S. Lacey testified as to his recollection of the events from October to December of 2000 and his interactions with

and observations of Complainant in working with the Maintenance Rule. I find Lacey to also be an honest and credible witness.

I find the testimony of Randy F. Ebright to be credible. He recounted his memory of the events as one of Complainant's supervisors. He also testified as to the circumstances surrounding Complainant's termination and the procedures followed for the termination. I find Ebright to be a forthright, consistent and thorough witness.

I also find the testimony of Craig H. Fritts to be credible. I find him to be articulate and knowledgeable, and found no indicia of dishonesty in his testimony. Fritts holds strong convictions concerning the circumstances surrounding his termination and he expressed his opinions cogently. Differences of opinion may exist as to the interpretation of events, but for the most part, I did not find that Fritts embellished the facts as they pertained to the events leading up to and surrounding his termination.

FINDINGS OF FACT

Background

In April of 1999, Fritts was hired as a Plant Engineering Director's Technical Assistant to work at the Donald C. Cook Nuclear Power Plant (hereinafter "Cook"), which is operated by Indiana Michigan Power Company (I&M), a subsidiary of American Electric Power Company, and located in Bridgman, Michigan. Cook had two nuclear reactors, and at the time of Complainant's hiring both were shut down. In September of 1997, I&M elected to shut down both of Cook's nuclear reactors in response to findings from a NRC inspection in August 1997. (JX 6). The inspection led the NRC to be concerned about the "operability of safety related systems and components."[1] (JX 6). I&M had apparently not been

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[1] On September 19, 1997, the NRC issued a Confirmatory Action Letter detailing the issues with which the NRC was concerned:

a. To demonstrate that the recirculation sump level is adequate to prevent vortexing or make appropriate modifications;
b. To re-install venting in the recirculation sump cover;
c. To demonstrate the capability to cool down the units consistent with design basis requirement and make necessary procedural changes;
d. To change existing emergency procedures used in switching from the emergency core cooling to the recirculation sump so as to demonstrate adequate sump volume;
e. To provide overpressure protection within certain specifications;
f. To change the technical specifications to allow for certain operations of the Residual Heat Removal Suction Valve Interlock and acquire approval thereof by the NRC prior to restart;
g. To demonstrate that leakage of the Refeuling Water Storage

exercising proper control over design and licensing bases. (Tr. 929).

In the Summer of 2000, an NRC inspection revealed that Cook was not in compliance with the Maintenance Rule as prescribed in NRC regulations.[2] I&M personnel performed an analysis to determine the source of the non-compliance. (JX 25). From the analysis, it was determined that "inadequate management prioritization," "lack of...task prioritization," and insufficient supervision, leadership and training were responsible for non-compliance with the NRC regulations. During the shutdown period, the NRC had a constant presence at Cook as three NRC resident inspectors were on-site. (Tr. 316, 378, 924, 1451). Weekly meetings occurred between plant personnel and the NRC residents. (Tr. 1451). In addition, the NRC residents performed "exits" every six weeks to check on the progress in correcting operational deficiencies. (Tr. 924). In January of 1999, I&M began the process of restarting the reactors which was significant, time-consuming and stressful. (Tr. 1510). The pressure to ready the reactors for restart was enormous as the cost of shutdown was approximately two million dollars a day. (Tr. 499). Thus, any delay in restarting either of the reactors was very costly.

The Unit 2 reactor was finally restarted in June of 2000. In December of 2000, the Unit 1 reactor was restarted. (Tr. 225, 687).

The focus at Cook in April of 1999, at the time of Fritts' hiring, was on restarting both reactors. Fritts testified that he was not hired for any particular area in engineering, but that Cook needed personnel experienced in a reactor restart environment. (Tr. 346). During the hiring process, Fritts was told that he was to begin as a Plant Engineering Director's Technical Assistant reporting to Dan Garner and then "take a supervisory position fairly shortly after that." (Tr. 447).

Before his employment at Cook, Fritts worked for ten years as a Systems Engineer at the Fort Calhoun Nuclear Power Plant in Omaha, Nebraska. (Tr. 335). At the beginning of his employment, Fort Calhoun was in a "restart environment" much like that at Cook. (Tr. 342). Prior to his work at Fort Calhoun, Complainant was a Systems Engineer at the Monticello Nuclear Power Plant in Monticello, Minnesota. (Tr. 336-37). In addition, Fritts had experience in nuclear engineering while serving as an officer

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Tank Mini-flow Recirculation Lines do not exceed the regulatory allowances; and

h. To review emergency procedures to account for instrument uncertainties.

[2] See *infra* at 10-13 for explanation of Maintenance Rule.

working on nuclear submarines in the United States Navy. He participated in the Navy's nuclear power training program, which he believed to be comparable to receipt of a Master's Degree in Nuclear Engineering. (Tr. 344).

For much of Complainant's employment at Cook he supervised the Maintenance Rule Program (hereinafter "MRP" or "MR"). The MRP involves tracking the performance of the systems, structures and components of a nuclear power plant. This program is required by NRC regulations as codified under 10 C.F.R. 50.65. If certain systems within the plant are not meeting their performance criteria, the regulations require that nuclear power plants "monitor the performance or conditions of structures, systems or components, against licensee-established goals, in a manner sufficient to provide reasonable assurance that such structures, systems and components...are capable of fulfilling their intended functions." 10 C.F.R. 50.65(a)(1).[3] The structures, systems and components to be monitored are both safety and non-safety related. The non-safety related structures, systems and components to be monitored are those which "mitigate accidents...or are used in emergency operating procedures..or whose failure could prevent safety-related structures, systems and components from fulfilling their safety-related functions" or cause an automatic shutdown of a safety-related system. 10 C.F.R. 50.65(b)(2)(i)-(iii). A functioning MRP allows plant personnel to determine use capabilities of plant equipment, successful operation of equipment, performance evaluation and risk in taking equipment out of commission for repair. (Tr. 992-93). It also ensures that adequate maintenance is being performed. (Tr. 1151).

If a plant's MRP is found to be deficient, steps must be taken to correct the deficiencies. This is known as a recovery effort. (Tr. 187). Software programs are used in the MRP to "track[] and trend[] safety-related systems" to determine the unavailability of systems within the plant. (Tr. 205). At Cook, there were systems for which monitoring under 10 C.F.R. 50.65(a)(1) was required. Due to deficiencies in the MRP, Cook personnel were required to engage in MRP recovery, which involved the "reconstitution" of data. (Tr. 187). This was accomplished by individuals taking raw information, both in electronic and paper form, to evaluate the run time of components, the number of times a component is started or stopped, and the types of failures experienced by components. (Tr. 187). At Cook, the raw information was obtained from several sources. Control room log entries were compared with maintenance records for particular systems as well as job orders and action requests. (Tr. 190, 1437). This was an onerous task as there were "tens of

[3] The regulations provide that if a nuclear power plant has shown that it is effectively controlling "the performance or condition of a structure, system or component" through "appropriate preventative maintenance," such monitoring under 50.65(a)(1) is not required. 10 C.F.R. 50.65(a)(2).

thousands" of entries for personnel to evaluate. (Tr. 191). This information was entered into a database to be used by system engineers. A functioning MRP access database allowed the system engineers of the plant to determine whether a particular system was applicable to the MRP. (Tr. 192). Non-compliance with 10 C.F.R. 50.65 can result in NRC cited and non-cited violations and could possibly result in the shut down of the reactor.

Employee Evaluation and Discipline at Cook

From the Fall of 1998 to the Spring of 2000, Cook used an employee evaluation program entitled "Performance Assessment for Results" or "PAR." (Tr. 1664). Supervisors were trained in this program which instructed them to use varying methods of rating employee performance. (Tr. 1665). PAR measured six "effectiveness standards" for performance: communications, job knowledge, leadership/initiative, problem-solving, safety-consciousness, and work relationships. (JX 7 at 10). Supervisors rated employees in each category from a low standard of unsatisfactory to a high rating of exceeding standards. The end result of the evaluation was that the employee received a weighted score which placed him or her in one of four categories, referred to as "Tiers." (JX 7). Tier I represented the highest level of performance and Tier IV the lowest. Tier III and IV rated employees faced the possibility of termination. A Tier III or IV employee was required to improve their performance in accordance with a personalized Action Plan within an allotted time period. (JX 7 at 67). The Action Plan detailed the "behaviors and/or circumstances" preventing adequate employee performance and provided specific actions needed to improve performance. (JX 10 at 7). Tier IV employees were given the option of a voluntary severance package. During the Action Plan period, an employee was required to demonstrate "immediate, significant, and continuous" improvement to succeed in his or her plan. (JX 10 at 7). If either a Tier III or Tier IV employee was unsuccessful in his or her Action Plan, that employee would be terminated. (JX 7 at 67).

PAR evaluations began with the employee's immediate supervisor, who assessed, evaluated and rated that employee's performance in accordance with the PAR standards. (Tr. 1669). The completed PAR evaluation was then sent through a chain of command for review. First, the initial supervisor's immediate superior reviewed the evaluation. Secondly, the Plant Director for the applicable department, *e.g.* Engineering, reviewed the evaluation. Finally, the Senior Leadership Team reviewed the evaluation. At Cook, the Senior Leadership Team was composed of Bob Powers, Senior Vice President of Nuclear Generation; Chris Bakken, Site Vice President in charge of the plant's day-to-day operations; and Michael Rencheck, the Vice President of Engineering. (Tr. 1671).

At the initial review stage of the 2000 PAR evaluation, the Senior Leadership Team felt that the evaluations were too high and did not accurately reflect the unsatisfactory status of the plant during shutdown and the process of restarting. (Tr. 1672). The team issued a memorandum expressing their concern that efforts to improve organizational performance, that in part had led to the shutdown of the reactors, had not been achieved. (JX 126). Therefore, the team ordered a re-evaluation of the ratings, after which many individual employee scores were lowered. Upon second review, the team still found that the evaluations reflected an undeserved high rating. Instead of ordering an additional re-evaluation, the team sent all of the PAR evaluations to the Human Resources Department where another review was conducted. Human resources created "review boards" composed of two plant supervisors and one human resources representative. Each board reviewed a portion of individual PAR evaluations and further changes were made to scores. (Tr. 1674). A significant number of employee evaluations were affected by the review. This was the final review of the 2000 PAR evaluations.

In addition to PAR, Cook also employed a system entitled "Management Action Response Checklists" or "MARC." This system was used to handle grievances, disciplinary action, and job performance counseling. (JX 95). The system included step-by-step procedures to assist managers and supervisors in handling those issues. The checklists comprise a series of questions or issues the supervisor should contemplate before taking disciplinary action or job performance counseling.[4] Although there was no intention to merge the PAR and MARC programs, some supervisors used elements of MARC in performing PAR evaluations or in assessing an employee's success in his or her PAR Action Plan. (Tr. 1746). Prior to the MARC program's inception, supervisors maintained a personnel file on each subordinate. (Tr. 1749-50). This file might contain a supervisor's notes on a subordinate's performance and/or particular events or incidents, whether favorable or unfavorable. The MARC program suggested that supervisors keep such a file on each subordinate. As a result, once the program was implemented, many supervisors referred to their personnel files as "MARC files."[5] (Tr. 1749-50). However, the file did not need to be used solely

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[4] For example, under the checklist entitled "Discipline for Poor Productivity or Below Quality Job Performance" the following questions appear:

(a) Can specific examples/incidents be documented and was the employee made aware of the deficiency at the time?

(b) Is there an incentive system or bonus system in effect? If so, what effect will the corrective action have on the incentive/bonus payments?

(c) Is the employee a union officer or steward? Is there a possible "union animus" appeal for the employee?

[5] For purposes of this decision, I will refer to these files as MARC files.

for MARC disciplinary purposes. Ebright referred to his personnel file on Complainant as a MARC file. (Tr. 970). In the MARC file, Ebright documented conversations, evaluations of work product, notations on written communications, and other relevant personnel data. (Tr. 970-71). Ebright made these notations and entries "at the time or on the day, and never more than twenty-four hours after the occasion, the observation, the meeting, the conversation, etc." (Tr. 971).

Chronology of Events Surrounding Complainant's Safety Concerns and Termination

In July of 1999, one and a half months into Complainant's employment at Cook, he was subjected to a PAR performance evaluation. Complainant's PAR evaluation resulted in a Tier I designation. Fritts assumed supervisory duties making him responsible for the MRP and the Preventative Maintenance Program in August of 1999. The Preventative Maintenance Program differs from the MRP as it enables the plant to determine whether a system, structure or component requires maintenance and how often; whereas the MRP ensures that the correct maintenance is performed. (Tr. 352-57, 911).

In April of 2000, Complainant reviewed and approved a report stating that Cook's MRP was in compliance with 10 C.F.R. 50.65. In addition, in April or May of 2000, Complainant received a $5,000 bonus. Complainant testified that he believed this bonus to be merit-based and that his supervisor, William S. Lacey told him, after presentation, to keep it quiet. (Tr. 612). Lawrence Bossinger, then the plant's human resources manager, testified that the bonus was not merit-based and that it was given to 318 employees at Cook in the Spring of 2000 for the long overtime hours worked prior to the Unit 2 reactor startup. (Tr. 1704-06). Lacey also testified that the bonuses were not merit-based and that as not all employees worked overtime hours, and thus did not receive the bonus, he wanted those receiving a bonus to "keep it quiet." (Tr. 1464-65). He acknowledged telling numbers of employees to "keep it quiet" since not all employees received the bonus. (Tr. 1465). The Unit 2 reactor was restarted in June of 2000.[6]

Complainant met with Michael Rencheck, Vice-President of Engineering, on June 11, 2000. Rencheck summarized the meeting in a memo to Fritts with a copy to be placed in his MARC file. (JX 1 at 8). Rencheck spoke with Fritts regarding an earlier status meeting in which Fritts represented that he had received inadequate information from the National Security Analysis Team (NSAT), which

[6] The record does not reveal the exact date of the Unit 2 restart. Dixon, Ebright, Fritts, and So all testified that Unit 2 restarted sometime in June of 2000. (Tr. 79, 283, 358, 381, 382, 1330).

performs analysis on sensitive information. However, once Rencheck contacted Jeff St. Amand of NSAT, he learned that Fritts' request for information had come only twenty-five minutes before the status meeting, which did not afford NSAT sufficient time to provide the information. With St. Amand on the phone, Rencheck contacted Fritts who admitted that St. Amand was correct and "apologized for unintentionally misrepresenting the information at the ... meeting." (JX 1 at 8). In the memo, Rencheck admonished Complainant for "not act[ing] properly in [his] communication," regarding his dealings in gathering information from a particular source. (JX 1 at 8). Rencheck counseled that Complainant needed to "follow through" and document interactions in a "professional manner." (JX 1 at 8). In addition, Rencheck warned, "Your behavior needs to be corrected to prevent future disciplinary action." (JX 1 at 8).

In July of 2000, Complainant was given additional supervisory duties over the Predictive Maintenance program. The Predictive Maintenance program determined whether preventative maintenance was required on systems, structures, or components through vibration analysis, oil analysis, thermography, and motor characterization. (Tr. 352-57).

Complainant received his second PAR evaluation at Cook on August 7, 2000. This was his first evaluation as a supervisor and the result was a Tier III rating. (JX 1). The consequence of the Tier III rating was that Fritts was assigned an Action Plan and given ninety days in which to succeed in it. Unsuccessful completion of a PAR Action Plan resulted in termination of the employee. (JX 7). As was noted above, Fritts' initial rating in July of 1999 had been a Tier I designation.

From August until December of 2000, Fritts reported to several supervisors. Ebright supervised all of the engineering programs at Cook, including those under Complainant's direction. In addition, Ebright administered and managed Complainant's PAR Action Plan. Fritts was to report to Ebright as detailed in his Action Plan. Lacey was the Plant Engineering Director for the Unit 2 reactor, and Fritts was required to update him daily on the MRP status. Lanny Thornsberry was Complainant's immediate supervisor from mid-October until his December termination. Fritts reported to Thornsberry on MRP Recovery Project activities. (Tr. 1258).

In August and September of 2000, the NRC found three MRP violations at Cook. (JX 24). These violations were non-cited due to their "very low risk significance." (JX 24 at 3). However, the NRC report also stated that "[b]ecause of the number of systems the licensee failed to monitor, the inspectors concluded that this issue was not an isolated case, and, if left uncorrected, could have become a more significant safety concern." (JX 24 at 13). In late August, a meeting occurred between Cook senior management and

the NRC inspectors regarding the MRP violations. As a result of this meeting, management directed the preparation of a MRP recovery program. At that time, Complainant was the head of the MRP, and the duty of preparing this recovery program fell to him. (Tr. 925, 1433). On August 29, 2000, Ebright met with Fritts to ensure that he understood what was required of him regarding the recovery program. (JX 1 at 15; Tr. 1006-07).

On September 1, 2000, a Condition Report was issued. (CX 8). The report addressed the monitoring, or lack thereof, of the Spent Fuel Pit Cooling/Cleanup during the shutdown of the plant. Complainant testified that he "concurred" in this report and that this marked the beginning of his protected activities, which he believes to be the cause of his termination. (Tr. 447). Ebright testified for Respondent that he directed the preparation of the condition report. (Tr. 999, 1181). The Condition Report's issuance led to a root cause analysis to determine the source of the MRP violations per plant procedure. (Tr. 417).

Ebright met with Complainant again on September 5, 2000, a meeting which he noted in Fritts' MARC file. He testified to the following concerning that meeting. He learned that Fritts had not developed a plan for the recovery program. Fritts denied the existence of problems with MRP compliance and communicated his frustration with what he believed to be an excessive workload. Ebright promised to assist him in the recovery program and acquire additional resources. (JX 1 at 20; Tr. 1007, 1009). Ebright also met with Complainant about the MRP on September 6 and 9, 2000. (JX 1 at 21, 25).

Complainant testified to the following events occurring in early September, 2000. He expressed concerns to Lacey about issues raised in the condition report concerning "fundamental" problems with the MRP, such as which systems were to "belong within the purview of the Maintenance Rule." (Tr. 451). Lacey responded with his own concerns that the MRP project should be limited to the issues presented in the condition report and that he did not want "to hear this...don't ask me for more time." (Tr. 452). In an early draft of an Engineering Action Plan subsequent to the Condition Report, Fritts testified that he listed the personnel resources he would require to bring the MRP into compliance, but that Lacey told him to strike that portion. (Tr. 469-70). He recommended to Lacey and Thornsberry that the Operations Clearance Logs be used as an additional source in creating the MRP database, but "got a lot of flack" from them over the suggestion. (Tr. 517). He also made this recommendation to the NRC resident during a meeting, but that recommendation was overruled by Lacey. (Tr. 518). However, Complainant also testified that the eventual decision against reviewing the clearance logs was reached jointly by himself, Lacey, and Thornsberry as "it was going to be very, very, very time consuming to do that clearance log review and we

could get a lot of the same information from the J[ob] O[rder] review and from the log review." (Tr. 817).

By September 12, 2000, Ebright relieved Complainant of his Preventative Maintenance program and Predictive Maintenance program supervisory responsibilities. (JX 1 at 26). After this date, Complainant was responsible only for the MRP. Ebright noted in the MARC file that "Craig does not appear to accept feedback he wants to fix issue without fully understanding issue...need [sic] to better express comm[unication] issues to [management]." (JX 1 at 26).

On September 16, 2000, Complainant received and signed his personal Action Plan which expressly indicated that he needed to be successful in the plan in order to retain his employment as a result of his Tier III PAR evaluation rating. The Action Plan listed performance deficiencies in the areas of "Communication" and "Leadership/initiative." (JX 1). The identified "Behaviors and/or Circumstances That Must Be Changed" included:

1. Allowing personal feelings and emotions to affect working relationships;

2. Avoiding certain people you should be working with, due to a perception that they are "difficult" to work with;

3. Ensuring that problem solving is done in a systematic approach (not just going after symptoms). This includes understanding the pervasiveness and extent of a condition associated with an issue;

4. Listening to others more fully and be more willing to let others express their opinions and thoughts;

5. Communicate within the chain of command to ensure that management within Engineering Programs is aware of the status of your assignments and tasks; and

6. Be willing to be self critical in order to improve quality of assigned programs.

(JX 1). The plan required Fritts to submit bi-weekly reports of meetings with customers and supervisors; on-going prioritization of customer needs; on-going development of a teamwork attitude; "manage improvement plan for the Maintenance Rule program" by December 1, 2000, as evidenced by daily debriefings with management; and participation in the "Engineering Programs Road to

Excellence document." (JX 1). Ebright noted in the MARC file that he impressed upon Fritts the need to complete this plan successfully. (JX 1 at 38).

A NRC debriefing at Cook occurred on September 26, 2000, in which Complainant participated. Ebright noted in the MARC file that Complainant interrupted the senior NRC resident several times and that he was "upset with challenges and appeared extremely defensive" and "argued that we were adeq[uate] in most areas of [Maintenance Rule] despite evidence that holes existed." (JX 1 at 39). Ebright attested at the hearing that Complainant was "very abrupt, very defensive...and on the borderline of argumentative with the NRC." (Tr. 1030).

On September 27, 2000, Ebright met with Fritts. Ebright noted in the MARC file: Complainant was not keeping Ebright informed of MR program status as required by his Action Plan. Complainant reported that he was informing Lacey of the status and expressed his frustration that he had "too many bosses." Ebright reminded him that he "expected to be kept in the loop" and discussed the quality and progress of the MR program. (JX 1 at 41).

On October 9, 2000, Ebright spoke with his superior, Robert Godley, and Lacey regarding Complainant's performance. This followed a meeting with Fritts on that date. The MARC file reveals the following comments: Complainant's "performance during [Maintenance Rule] recovery has not met expectations." While complaining that he did not have sufficient resources, Complainant did not "speak up to [identify] that resources were required." While Complainant reiterated that he had "too many bosses," Ebright reminded him that "his performance needed to improve and that he was key to the success of the [Maintenance Rule] recovery." (JX 1 at 45).

At a meeting on October 10, 2000, Fritts gave a presentation on the progress of the MR recovery program. Although he addressed problems associated with the control log room reviews, Ebright noted in the MARC file that Complainant was "very soft" in describing these problems and "may not have adequately characterized problem area and effectiveness of previous reviews." (JX 1 at 47). Personnel were extracting information from the control room log reviews relating to the unavailability of the plant's systems, structures and components. This information would be contained in an access database for use by System Engineers to determine compliance and applicability of the MRP. To address problems in the MR access database program, Complainant testified that he decided to expand the log review to include Job Orders and Action Requests and to review three years of logs instead of two. (Tr. 457-58, 510, 514). However, Fritts also testified that he participated in the joint decision to make these expansions. (Tr.

819). He reported the events in his personal notebook,[7] stating that although Buddy Springman, a member of the MRP team, had sampled the data two weeks previously he did not inform him of the discrepancies. He noted that he spoke with Lacey, who suggested the need for written guidance for the data collection team. (JX 2 at 10-11). In addition, Complainant recorded that Thornsberry "seem[ed] to have taken over" the MRP recovery project. (JX 2 at 11).

Respondent had several witnesses testify as to the circumstances of the log review expansion for the MR access database program. Also on October 10, 2000, a decision was made by senior Cook management to conduct a full reconstitution of MR historical data. (Tr. 1433). This course of action initiated with Thornsberry who asked Springman to perform an audit on the collected data. (Tr. 1520). After finding problems from the audit, Springman reported to Thornsberry that data collected up to that point was insufficient for purposes of the MR and was unreliable. (Tr. 791-92, 1441-42, 1520-21; JX 2 at 10). Thornsberry and Springman brought this information to Lacey's attention. (Tr. 1437, 1522). Lacey then decided that the three to four weeks of data collection had to be "scrapped" and Lacey and Thornsberry ordered that qualified personnel continue data collection. (Tr. 1056-57, 1074-75, 1184-85). In addition, Lacey expanded the continued effort to review the control room logs from a two-year to a three-year review and to include a review of Job Order and Action Request logs based on the information Thornsberry and Springman provided. (JX 2 at 10, Tr. 798-99, 1437, 1522). Ebright noted in the MARC file that Complainant was aware that the collected data was unreliable, but that he "did not go back and correct the earlier reviews." (JX 1 at 50). Furthermore, Ebright recalled a post-meeting conversation in which Fritts commented that the project needed to be finished before the NRC inspection in November. (Tr. 1046). Ebright told Complainant that the approach was incorrect and that they would "apply the resources and take the time to do it correctly, irrespective of the NRC's inspection schedule." (Tr. 1046-47).

On October 11, 2000, Ebright and Complainant met to discuss Complainant's performance. In the MARC file entry for that date, Ebright recorded the following:

> Dan [Garner] provided Craig [with] mark up...Craig took no action based on

[7] Fritts maintained a private notebook which he used as a planner or diary. (Tr. 810-13). In the notebook, Fritts recorded actions taken or needing to be taken in either the MRP, Preventative Maintenance Program or Predictive Maintenance Program. (Tr. 810). He used the notebook for his own personal benefit to remind himself of actions he needed to take with his various responsibilities at Cook. (Tr. 810-812).

conversation on 10/10. Craig failed to take action even though Dan directed it. Dan will be [the Maintenance Rule] designee...Dan's feedback is that Craig felt it was too hard to [change].

Reviewed Craig's performance [with] Lacey. [Lacey] has repeatedly counciled [sic] Craig to do things differently more rigorous than previous.

Craig failed to provide written guidance for log reviews. Resisted to do anything other than [control room] logs for unavailability review...also overlooked [identification] of funct[ion] failures.

Craig stated to NRC didn't have enough time to do other than log reviews.

Craig was directed to provide daily updates to [Lacey], he failed to do this.

Date [changes] in [Maintenance Rule] project – neither m[anager] nor dir[ector] kept informed.

Asked Craig for feedback on his performance. Craig is taking actions on parts of [Maintenance Rule] project that he believes he has control over...Craig stated several times that he was project m[anager] but others were initiating efforts and that he was unable to influence...Craig is not able to keep up with supervisor duties.

Feedback...Procedure [change] – to facilitate verbatim compliance...was not performed...feedback from D. Garner – Craig denied that he failed to follow Dan's direction.

As we got [control room] log reviews – did you become aware of holes (unavailability) discussed [with] op[erations] with [Predictive Maintenance] m[eetings] directors, feedback from Buddy Springman (sample of 3 ten day periods), [identifies] some things that should have been picked up during log reviews. What did we do[?] Did not go back and correct.

> At NRC meeting, NRC asked are you doing anything other than logs. Craig told them only [control room] logs would be reviewed based on industry norms.
>
> [Identify] fact that funct[ion] fail[ures] could be determined from [control room] logs. Craig stated yes.
>
> Lacey on vacation – asked Craig to keep him informed – Craig admitted he failed – [Lacey] reminded Craig but still failed to keep [Lacey] informed.
>
> Craig stated that he believes that he is not defensive as to what has been done – he stated that he had 3 or 4 bosses and non[e] are avail[able] to him.
>
> Performance during m[eetings] – didn't allow NRC to ask [questions] or make statements...made judgement statements such as we're only going to look [at] [control room] logs for unavail[ability].
>
> Feedback was provided regarding need to [change] procedure for expert panel no action taken to revise proc[edure].
>
> Requests from [Unit Two] Plant Eng[ineering] Dir[ector] and Eng[ineering] Progr[am] m[anager] to be kept informed of progress/status/changes...not kept supervision informed despite feedback to provide info – no corrective action taken.
>
> Craig became extremely emotional and argumentative. Refused to accept feedback...denied performance issues. He stated that he needed to know who was his boss and that others were impacting his performance.
>
> I ended the meeting and told Craig that we would reconvene tomorrow. I debriefed Lacey.

(JX 1 at 49-53).

Regarding the October 11 meeting with Ebright, Fritts recorded in his notebook that the meeting "didn't go well - list of my

failed communications, etc." and that he told Ebright that he "could not operate in the environment of reporting to 3 different managers who did not talk to each other." (JX 2 at 10).

On October 12, 2000, the meeting between Fritts and Ebright reconvened with Lacey also present. At the conclusion of the meeting, Ebright and Lacey informed Complainant that Thornsberry would be taking over as the head of the MR recovery program and would be Complainant's direct supervisor. (JX 2 at 11; JX 1 at 54; Tr. 837-38, 1070-72, 1458-59). Ebright recorded the meeting as follows in the MARC file:

> Met [with] Craig [and] Lacey. After reviewing issues assoc[iated] [with] Craig's perform[ance] feedback on 10/11, Craig continued to state that he was confused regarding his reporting chain, that he was getting direct[ion] from multiple sources and that he was frustrated [with] it...reviewed dissatisfaction with Craig's performance, not meeting st[andards]. Craig blamed others for his failure to implement, devise, or direct issues to sat[isfy] closure regarding [Maintenance Rule] recovery.
>
> Informed Craig that base[d] on his performance, he was to directly report to L Thornsberry as an ind[pendent] contributor.
>
> Lacey explained that it is expected that multiple reporting/[command] chains exist at this (his) level of org[anization].
>
> Craig must work to improve comm[unication] skills to ensure that all stakeholders remain informed of key issues [and] status.
>
> [Lacey] enforced that Craig must be responsible for items under his control – or assignments.

(JX 1 at 54-55).

On October 17, 2000, Fritts missed a meeting at which he was to give a MR recovery project presentation. (JX 1 at 56). The next day, Ebright met with Complainant. Ebright recorded in the MARC file that Fritts "did not appear to have good status. He was defensive and stated that reviews were on track." (JX 1 at 57).

Thornsberry issued a memo regarding Complainant's performance to Ebright on October 21, 2000. (JX 1 at 58). In the memo, Thornsberry relates an incident in which Complainant was to secure a room for System Manager training on a certain date. At five o'clock in the afternoon, Complainant had not yet informed one of the System Managers' supervisors about the meeting. After speaking with Thornsberry, Complainant contacted that supervisor's secretary to have her relay the message. The result was that the Unit 2 reactor System Managers were not scheduled for training. Thornsberry believed that this represented "poor communication" as Complainant "[w]ait[ed] until the last minute" to inform the System Managers' supervisor about the training and used an "unacceptable means of communication." (JX 1 at 58).

On October 26, 2000, Ebright noted in the MARC file that he met with Godley and Lacey to review Complainant's performance. He found that Complainant did "not not not appear able to success[fully] compl[ete] plan." (JX 1 at 64). Godley directed Ebright to discuss the matter with the Human Resources Department. He noted that both Godley and Lacey acknowledged "performance issues" with Complainant. (JX 1 at 64). Ebright testified that he discussed termination with Godley and Lacey at this meeting and that he intended to discuss termination procedures with Human Resources. (Tr. 1088-89, 1097).

Ebright contacted Lawrence Bossinger, the Human Resources Manager, within several days of the meeting with Godley and Lacey. (Tr. 1098). His first inquiry was whether termination could occur before the expiration of the ninety-day PAR Action Plan. (Tr. 1099). After explaining the lack of improvement Ebright saw in Complainant's performance, Bossinger recommended termination and stated that they need not wait until the PAR Action Plan period expired. (Tr. 1099). Bossinger requested that he be able to review the documentation regarding Complainant's performance and assigned Duane Morrison, also of Human Resources, to work with Ebright on the matter. (Tr. 1100). After reviewing the MARC file, Bossinger and Morrison agreed that Complainant was unsuccessful in his PAR Action Plan and that they "should take immediate action to proceed forward with the termination." (Tr. 1101).

In a memo dated October 30, 2000, Lacey detailed Complainant's performance shortcomings. (JX 1 at 66-67). Fritts did not make verbal daily reports to Lacey regarding recovery project status as requested. Fritts reported that the data collection was of good quality, when it was apparent that the data was unreliable. When a deficiency in MR procedure was brought to his attention, Complainant failed to correct the procedure. Lacey concluded that "[b]ased on these examples it can be seen that Craig has not met expectations. He has not been flexible in adapting to changing situations nor has he been receptive to suggestions about change.

He has not been timely in responding with procedure and desktop guide changes, which were under his purview." (JX 1 at 67).

On November 2, 2000, Dan Garner sent a memo to Ebright regarding work he had assigned to Fritts. In addition to serving as Director of Fuels and Safety Analysis, Garner was the Chairman of the Expert Panel[8] involved with the MRP. (Tr. 1048). Garner explained that Complainant had the assignment for over two weeks and Complainant had yet to begin. Garner handed the project to another employee to complete. (JX 1 at 69).

At a November 9, 2000 meeting Fritts responded to questions about the MR recovery project by the NRC senior resident. (JX 1 at 81). Ebright noted in the MARC file that Complainant gave reasons why he believed Cook was meeting MRP requirements, but were not in "literal compliance." (JX 1 at 81). Ebright believed this to be the "wrong message to give to [the] regulator." (JX 1 at 81).

Also on November 9, 2000, Springman, of the MR recovery team, e-mailed Ebright, Thornsberry, Lacey, Jim Johns and Fritts regarding the status of the MR recovery project. He stated:

> I am frustrate [sic] with Craig's inability to hear what I say. As I told him yesterday, I am NOT in charge of the historic log review. I am too busy doing work that for some unknown reason, the MR team was never staffed for.

(JX 1 at 76).

On November 10, 2000, Ebright noted in the MARC file that Complainant represented that the plant was on course with the MRP, but provided "no formal evidence." (JX 1 at 82). He added that Complainant displayed no leadership.

Ebright testified that he drafted a Recommendation of Termination letter for Complainant on November 11, 2000. (Tr. 1102-06; RX 1). He forwarded the draft to Bossinger and Morrison. Bossinger testified that he reviewed the draft the third or fourth week of November. (Tr. 1699).

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[8] "Expert panel" refers to an oversight organization within the plant responsible for reviewing the depth and direction of the various programs for establishing and maintaining performance standards. Tr. 1048-49).

In mid-November, Complainant discovered that the terms of contract employees[9] working on the MR recovery project would end on December 15, 2000. Fritts "made an effort" to get their contracts extended and was successful in extending the contracts of Eric Ballon and his secretary for eight additional days. (Tr. 504-05).

On November 22, 2000, Fritts issued a congratulatory e-mail to the MR data collection team and to management for a fine job on MR data collection stating that it was "a monumental task completed WITH QUALITY." (JX 1 at 90)(emphasis in the original).

On November 26, 2000, Springman authored a recommendation regarding the MR access database. He suggested that the MR recovery project suffered from lack of resources. Ultimately, he recommended the retention of two contract employees to continue working on the MR database. (JX 56 at 4).

Fritts directed an e-mail on November 29, 2000 to Randy Womack, the In-service Testing Supervisor. (JX 63). Ebright testified that this e-mail was in response to a request by Womack inquiring whether there were unresolved issues that would prevent the restart of the Unit 1 reactor. Ebright stated that Complainant's response was in the negative, indicating that there was "no restriction to plant restart...based on any open items associated with the Maintenance Rule Recovery." (Tr. 1414).

On November 30, 2000, the MR access database was released and available for desktop use by the system managers. (JX 66). Also on this date, Complainant sent a memo to Ebright, Godley, Thornsberry and Lacey about his concerns over the money allocated to the MRP and that he have adequate resources to bring the MRP into compliance. (JX 65). Respondent on brief notes that this budget concern relates to the 2001 budget, not 2000, and thus had no effect on the Fall 2000 MR Recovery project. (Respondents Proposed Findings of Fact at 19 n. 30).

On December 1, 2000, Complainant submitted a bi-weekly report to Ebright as required by his Action Plan. (JX 107). In the report, Complainant detailed the progress on the MR recovery project and work in the Preventative Maintenance group. He stated that the historical job order reviews had "gotten off to a slow start," but that the "[p]ace will pick up." (JX 107). The report contains no expressed concerns of lack of resources or inability to bring the MRP into compliance. Ebright testified that this was the only bi-weekly report submitted to him during Complainant's ninety-day PAR Action Plan period. (Tr. 983).

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[9] Those employees not actual employees of American Electric Power or I&M, but of Sargent & Lundy or another engineering service company who had been used by I&M on a temporary basis only.

Also on December 1, 2000, Fritts received an e-mail invitation to the Engineering Program Christmas party that was to occur on December 8, 2000. (JX 68). The e-mail was sent by Ebright's secretary.

In the first week of December, Fritts became concerned about "the capacity of the control room log database to perform its function." (Tr. 482). The database was available for use on November 30, 2000. (JX 66). In addition, he had received complaints from the System Managers about the database. (Tr. 484).

On December 5, 2000, Complainant represented in a MR recovery project meeting that efforts were "on track." (Tr. 1150; JX 1 at 99). Also on that date, Shane Lies, a system engineering supervisor, e-mailed Ebright to express his frustration with the control room log database. (JX 1 at 98). Lies complained that the database was released ten days late, which interfered with system engineering deadlines. On the date of database release, Lies believed that it was fully useable, only to find on December 5 that it was not. Additionally, he reported that the database contained duplicate information, complicating the work to be done by the system engineers. (JX 1 at 98). Complainant testified that he had been receiving complaints from the System Managers who were unable to use the database effectively. (Tr. 581).

On the evening of December 5, 2000, Fritts telephoned Lacey and Ebright to inform them of this concern and that he believed he needed to take the database out of commission to correct the problems. (Tr. 484). He testified that he told Lacey and Ebright that he would need a week or more to debug the database program. (Tr. 582). Lacey responded that taking the database out of commission seemed appropriate. (Tr. 582). However, Complainant perceived that Ebright was "not happy with it at all." (Tr. 582).

On December 6, 2000, Complainant took the MR access database program out of commission. Eric Ballon testified that Complainant told him they were stopping to perform a "check and adjust." (Tr. 216). Complainant held a meeting with his team to explain the halt on the database. Complainant testified that Lacey spoke with him after the meeting and told him that he had one day to fix the database and get it back in use for the system managers. (Tr. 587). Lacey seemed angry and upset and informed him that the Unit 1 reactor restart would not "be expanded to accommodate the Maintenance Rule recovery and that [Cook] would be in compliance on paper...if nothing else," according to Fritts. (Tr. 588). Lacey testified that he had no recollection of that encounter. (Tr. 1466-67, 1583). In a December 6 status report, Complainant noted that the control room log database would be unavailable temporarily while corrections were made, but would resume on December 7. (JX

78). Complainant recorded in his personal notebook that taking the database out of commission allowed for "time to step back, 'check and adjust,' make sure that the products we roll out to our customers reflect the quality that they deserve. This very well may affect our overall schedule, but I will not sacrifice quality for the sake of the schedule." (JX 2 at 36).

Ebright presented the Recommendation of Termination letter for Fritts to Godley, Bakken, Bossinger, Lacey and Rencheck for signatures on December 6, 2000. (Tr. 1166-67). Termination procedures required the consensus of these parties.

On December 7, 2000, Fritts expressed concerns to his supervisors regarding how System Managers were to gather "condition monitoring criteria, stating that without it the Expert Panel would not be able to determine MR compliance status. (JX 80).

Fritts was given his termination package on December 8, 2000. He was given the opportunity to resign rather than be terminated. He refused to resign. (JX 87).

Craig H. Fritts' Quality Concerns

Complainant testified that he brought quality concerns to management numerous times from September to December of 2000. He first brought his quality concerns to management's attention by concurring in the September 1, 2000 Condition Report, which he testified acted as a "blanket" Condition Report for subsequent concerns arising in the MR recovery project. (Tr. 752). In addition to the Condition Report, Fritts expressed verbally his quality concerns chiefly to Lacey, but also to Ebright and Thornsberry, in one-on-one conversations during the workday. (Tr. 768, 773). His concern was that without a quality MR, the systems, structures, and components would be in an "unknown condition." (Tr. 497). If those systems were in an unknown condition, plant employees would not be able to determine whether the systems covered by the MR were able to perform their safety functions. (Tr. 497). He testified that while Lacey and Ebright generally assented to extensions of the MR schedule or provided additional resources, the extensions and resources were insufficient and were provided grudgingly. (Tr. 451, 457, 458, 467, 479, 497). He testified that Lacey became angry on a few occasions regarding time extensions for the MR recovery schedule. Regarding the attitude of plant management, Fritts testified that the members of senior management and the supervisors had a "steaming mentality," meaning that they felt the project's timely completion was more important than safety or quality. (Tr. 510-11). Complainant believed that his supervisors were irritated with his expressed quality and safety concerns. Their irritation was apparent through tone of voice and body language. (Tr. 457-459).

Witnesses for Respondent testified that Complainant did not communicate his safety and quality concerns to his supervisors or management. Neither Lacey nor Ebright could recollect any conversations with Complainant regarding concerns of safety and quality. Ebright testified that Complainant often denied the existence of any problems with the MRP. (TR. 1180). In addition, Ebright testified that Cook management stressed the importance of safety and quality and did not have a "steaming mentality." (Tr. 1194). Martin Dixon testified that Ebright, Lacey and Thornsberry would not sacrifice quality to adhere to the schedule. (Tr. 328). Eric Ballon never felt pressured by Ebright, Thornsberry or Lacey to meet the schedule. (Tr. 234).

Dependence of Complainant's Employment on Completion of MR Recovery Project

Fritts asserts that his employment was conditioned upon the completion of the MR recovery project prior to the restart of the Unit 1 reactor. In support of this assertion, Complainant testified that Ebright told him that both their jobs "depend[ed] upon [Complainant] getting the Maintenance Rule reconstitution complete by Unit One restart." (Tr. 407, 778-80). Additionally, Complainant refers to his PAR Action Plan as further evidence. The Action Plan listed as one of Complainant's performance goals to "manage improvement plan for the Maintenance Rule program" by December 1, 2000. (JX 1). Ebright testified that he never told Complainant that their jobs were conditioned upon completion of the MR recovery project before Unit 1 restart. (Tr. 1176). Regarding the language of the Action Plan, Ebright testified that he chose the word "manage" purposely because he knew that it might not be possible to complete the MR Recovery Project before the restart of Unit 1. (Tr. 979). Ebright testified that he was interested in "observ[ing] [Complainant's] management" throughout the Action Plan period to track Complainant's success in managing the recovery effort. (Tr. 980).

Disparate Impact

Fritts asserts that he was treated differently at I&M on account of his engaging in protected activity. In support of this argument, Complainant seeks to demonstrate that Bob Kalinowski and Dominic So were similarly situated employees who were treated differently than he.

Bob Kalinowski was an employee at I&M who received a Tier III rating in the 2000 PAR evaluation. Fritts states that Kalinowski was demoted rather than fired. Respondent asserts that Kalinowski was successful in his Action Plan, whereas Complainant was unsuccessful and hence there was no reason to terminate Kalinowski. In response to a request for updates on employee success in Action

Plans, Ebright e-mailed the human resources department in late October 2000 that Kalinowski was successful in his Action Plan. (JX 144). In addition, Ebright testified that Kalinowski had a talent for task management and had been with the plant "for years" and would be an excellent resource in a different capacity. (Tr. 1005).

Dominic So also received a Tier III rating in the 2000 PAR evaluation. So began working at Cook in March of 1999. By May of 2000, So was the Chair for the Design Change Package Impact Meeting Review Committee. (Tr. 53). The MRP was under So's control "briefly." (Tr. 67). In the Fall of 2000, So was responsible for the Air-Operated Valve Program (AOV). (Tr. 70-79). This program involved checking the approximately 700 valves associated with each reactor to insure that the valve is operable. (Tr. 79). So had safety concerns regarding the readiness of the AOVs. (Tr. 88). From October through November of 2000, he communicated these concerns to Ebright and addressed them in sixteen condition reports. (Tr. 85, 92, JX 187-201). So testified that Ebright did not "want to hear about operability concerns. He [did not] want to talk about safety concerns." (Tr. 95).

Ebright drafted a Recommendation of Termination letter for Dominic So and circulated it among the proper authorities, with So's MARC file, for signature on December 6, 2000, the same day as Complainant's letter was circulated. (Tr. 1227-28, JX 177 at 95). However, when the letter and MARC file reached Michael Rencheck's desk, he refused to sign. Rencheck remembered that So had success in the assignment previous to his managerial position and wanted to give him another chance to prove himself. As a consensus was required for termination, So could not be terminated without Rencheck's signature. Therefore, So was not fired and was moved to the Licensing Renewal Group and given an additional Action Plan. However, when So was unsuccessful in the additional Action Plan, he was also terminated. (JX 180, 181).

Complainant also presents evidence that out of seventy-six Tier III rated employees, only he and Dominic So were fired. (Tr. 1683, 1690). He offers this as statistical evidence of discrimination. (Complainant's Reply Brief at 18-19).

CONCLUSIONS OF LAW

Elements and Burdens of Proof

The employee protection provisions of the ERA are set forth at 42 U.S.C. § 5851. Subsection (a) proscribes discrimination against employees of ERA governed employers as follows:

> 1. No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee
>
> (a) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et. seq.);
>
> (b) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954..., if the employee has identified the alleged illegality to the employer;
>
> (c) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (d) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954;
>
> (e) testified or is about to testify in any such proceeding; or
>
> (f) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851 (citations omitted).

In addition, the statute sets out the burdens of proof in 42 U.S.C. §5851(b)(3):

> (A) The Secretary shall dismiss a complaint..., and shall not conduct the investigation required...unless the complainant has made a

> prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required...shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> (C) The Secretary may determine that a violation...has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered...if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 5851(b)(3).

Since Fritts' employment was within the state of Michigan, this case is controlled by the law of the Sixth Federal Circuit. However, there are no Sixth Circuit opinions in which the post-1992 ERA amendments have been applied. The two leading cases applying the post-1992 ERA amendments are *Trimmer v. U.S. Department of Labor*, 174 F.3d 1098 (10th Cir. 1999) and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997). In *Trimmer* and *Stone & Webster*, the burden of proof appears to be

interpreted and applied in the same fashion[10]. The proof burdens as stated in Trimmer are as follows:

> The Energy Reorganization Act of 1974 (ERA) prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. §5851(a). In 1992 Congress amended §5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24 (amending 42 U.S.C. § 5851(b)). Although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints. Consequently, § 5851 contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* § 5851(b)(3)(A). Even if the employee has established a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of

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[10] Recent cases from the Administrative Review Board (Board) reveal inconsistencies in its application of the burdens of proof in ERA whistleblower claims. Although the Board appears to be in agreement with *Trimmer* and *Stone & Webster* in interpreting the burdens of proof in these cases, the Board has not been consistent in its application of the burdens of proof in later decisions. I say this because in *Gale v. Ocean Imaging,* 97-ERA-38 (ARB July 31, 2002), the Board applied a Title VII burden-shifting framework, where *Trimmer* indicates that the 1992 ERA amendments replace the Title VII framework with a distinct framework of its own. However, the Board recently issued *Guitierrez v. Regents of the University of California,* 98-ERA-19 (ARB Nov. 13, 2002), in which the Title VII framework is not mentioned and application of the proof burdens is in a manner consistent with the requirements of *Trimmer* and *Stone & Webster*. The Board had not employed a Title VII framework in *Bourland v. Burns Int'l Security Services*, 98-ERA-32 (ARB Apr. 30, 2002) or *Parker v. Tennessee Valley Auth.*, 99-ERA-13 (ARB June 27, 2002).

> such behavior. *See* § 5851(b)(3)(B). Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.
>
> If, as here, the case proceeds to a hearing before the Secretary, the complainant must prove the same elements as in the prima facie case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. *See* § 5851(b)(3)(C); *see also Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997)(holding that Secretary's construction of § 5851(b)(3)(C), making complainant's burden preponderance of the evidence, was reasonable). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *See* § 5851(b)(3)(D).

Trimmer, 174 F.3d at 1101-02.

Although reviewing a pre-1992 ERA amendment case, the Third Federal Circuit addressed briefly the effect of the 1992 ERA amendments in *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3rd Cir. 2002). The Third Circuit stated:

> The Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210[11] to incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a "contributing factor" in the unfavorable personnel decision.

Id. at 249. The Court noted that since the case concerned a claim filed prior to the effective date of the amendments that "before the 1992 amendments allocating the procedural burdens...in a whistleblower discrimination claim...the Secretary consistently

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[11] Section 210 was the former employee protection provision. The section was changed to Section 211 with the 1992 amendments.

utilized the burden shifting taxonomy for ERA retaliation actions set forth in *McDonnell Douglas*." *Id*. at 250.

In this case, I shall apply the evidentiary framework as prescribed in 42 U.S.C. § 5851(b)(3)(C) and (D) and as interpreted by *Trimmer*, *Stone & Webster*, and *Doyle*. Therefore, Complainant has the initial burden to prove by a preponderance of the evidence that: (1) he engaged in protected conduct; (2) Respondent was aware of that conduct; (3) Complainant suffered an adverse employment action; and (4) that his protected activity was a contributing factor in the unfavorable personnel decision. 42 U.S.C. § 5851(b)(3)(C)*; Trimmer*, 174 F.3d at 1101-02; *Stone & Webster*, 115 F.3d at 1572; *Guitierrez,* 98-ERA-19 at 5. If Complainant proves his burden by a preponderance, then Respondent can avoid liability if it can prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. 42 U.S.C. § 5851(b)(3)(D).

On brief, Complainant cites to *Stone & Webster* for the proposition that the 1992 ERA amendments created an evidentiary paradigm independent of Title VII. Complainant argues that he has the burden of proof to establish a *prima facie* case of discrimination, and if he does so, then he "need only demonstrate by a preponderance of the evidence that protected activity was a 'contributing factor' in the termination. (Complainant's Reply Brief at 27). Regarding the 1992 amendments to the ERA, Complainant argues that Congress lowered the complainant's burden of proof in changing the causation standard from proving that the protected activity was a "significant" or "motivating" factor to a "contributory factor." (Complainant's Brief at 131). Complainant argues that in establishing his prima facie case, "proximity in time is sufficient to infer causation." (Complainant's Brief at 125). Then the burden shifts to Respondent to prove by clear and convincing evidence that it would have taken the adverse employment action in the absence of the protected activity. (Complainant's Brief at 132).

Respondent argues that the 1992 ERA amendments did not lower the Complainant's burden of proof. (Respondent's Brief at 4). Respondent sets out the burdens of proof during the investigative and post-hearing stage as in *Trimmer*. (Respondent's Brief at 5-6). However, Respondent argues that it must provide clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity only if Complainant has proven that Respondent had both legitimate and non-legitimate reasons for the adverse action. (Respondent's Reply Brief at 6-7). Respondent argues that the burden is shifted from the Complainant only in a dual motive case.

As discussed above, Fritts must demonstrate, *i.e.* prove by a preponderance of the evidence, that his protected activity was a

contributing factor[12] to the adverse employment action. *Dysert v. Florida Power Corp.*, 93-ERA-21, slip op. at 3 (Sec'y Aug. 7, 1995), *aff'd sub nom.*, *Dysert v. Secretary of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997); *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster*, 115 F.3d at 1572; *Bourland v. Burns Int'l Security Services*, 98-ERA-32 (ARB Apr. 30, 2002). On brief, Complainant, by stating that he need only raise an inference of causation, suggests that he is referring to the light burden in establishing a prima facie case in a Title VII framework or during the investigative stage of an ERA whistleblower complaint. Raising an inference of causation may be sufficient to establish a *prima facie* case during the investigative stage, *e.g.* through temporal proximity of the protected activity and adverse employment action. However, at this stage of the proceeding, Complainant has the burden to prove the question of ultimate liability by a preponderance of the evidence. *Parker v. Tennessee Valley Auth.*, 1999-ERA-13 (ARB June 27, 2002); *Trimmer*, 174 F.3d at 1101*; Carroll v. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). In *Stone & Webster*, the Tenth Circuit reviewed the evidence of record and affirmed the Secretary's finding that the evidence revealed an inference of causation that the protected activity was a contributing factor in the unfavorable personnel action. *Stone & Webster*, 115 F.3d at 1573-74. In determining whether there was an inference of causation, the Tenth Circuit looked to the evidence presented by the complainant to show this causation and the counter evidence presented by the respondent. *Id*.

Regarding Respondent's burden, I shall follow the decisions of *Trimmer*, *Stone & Webster* and the Administrative Review Board decisions consistent therewith.[13] Thus, if Complainant proves by a preponderance of the evidence the ultimate question of liability, then Respondent has the burden to prove by clear and convincing

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[12] In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court, interpreting a similar provision, observed:

> The words "a contributing factor"... mean any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted).

[13] *Bourland v. Burns Int'l Security Services*, 98-ERA-32 (ARB Apr. 30, 2002); *Parker v. Tennessee Valley Auth.*, 99-ERA-13 (ARB June 27, 2002); *Guitierrez v. Regents of University of California*, 98-ERA-19 (ARB Nov. 13, 2002).

evidence that it would have taken the same adverse employment action in the absence of the protected activity.

Here, it is uncontested that Complainant suffered an adverse employment action when he was terminated on December 8, 2000. In addition, Respondent does not argue that it was unaware of Complainant's alleged protected activity. Therefore, I must decide whether Complainant has proven by a preponderance of the evidence that he engaged in protected activity and if that activity was a factor in his termination.

Protected Activity

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). However, the ERA "does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *Id*. at 1295 (citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997)). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id*. Where Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

An employee's internal reports of safety concerns are protected activities under the ERA. *Goldstein v. Ebasco Constructors, Inc.*, 86-ERA-36 (Sec'y Apr. 7, 1992), *rev'd sub. nom.*, *Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. 1993)(per curiam); *Mackowiak v. University Nuclear Systems, Inc.*, 82-ERA-8 (Sec'y Apr. 29, 1983) The report may be made to a supervisor, through an internal complaint or quality control system. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

Initially, Respondent asserts that none of Complainant's activities are protected because the MRP does not implicate safety. Respondent argues that while the MRP provides confirmation that systems are fully operating, it has "no direct impact on the operability of any system." (Tr. 301-02). In addition, Respondent urges that there are many other systems at Cook that perform the same functions as the MRP. (Tr. 301-02, 1338). However, Complainant counters that the MRP is a safety-related regulation as

it monitors system performance and verifies the availability of those systems. (Tr. 496).

Complainant directs attention to the regulations which, under certain circumstances, require the monitoring of safety and non-safety related structures, systems and components to ensure that they "are capable of fulfilling their intended functions." 10 C.F.R. 50.65(a)(1). The regulation further defines non-safety related structures for the purpose of MRP monitoring to be those which assist in the operation of a safety-related function or that would hinder the operation of a safety-related function were those structures to fail. 10 C.F.R. 50.65(b)(2)(i)-(iii).

I find that the MRP is safety-related. Although nuclear power plants may have other systems in place performing similar functions, the MRP is a monitoring program required by the NRC regulations. It is not in dispute that Cook was required to monitor a portion of its structures, systems and components and bring that monitoring program into compliance with the regulations. The regulations themselves express the purpose of safety. Therefore, I find that the MRP is a safety-related program.

Fritts argues that he engaged in protected activity in his actions and communications from September 1, 2000 until December 6, 2000. He asserts that his protected activity began on September 1, 2000, when he concurred in a Condition Report, which addressed the MRP violations found by the NRC. This activity was shortly followed by a conversation with his supervisor Lacey regarding what he perceived to be too narrow a focus on bringing the MRP into compliance. Complainant also prepared an Engineering Action Plan in response to the Condition Report. The concurrence and the conversation expressed concerns about the quality of the current MRP and how to address its deficiencies appropriately. The Condition Report addresses the problem that the MRP, at that time, was unable to assess unavailability of the Spent Fuel Pit Cooling/Cleanup system, and therefore, plant employees could not "determine if systems are being taken out of service too often so that they are not available when needed." (CX 8). Complainant testified that the earliest revision of the Engineering Action Plan contained a request for additional resources. I find the concurrence and the subsequent conversation to be protected activities. *See Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994)(finding internal reports of safety and environmental concerns to be protected activity). However, I do not find Complainant's preparation of the Engineering Action Plan to be a protected activity, as Complainant has produced no evidence to show that the request for resources was connected to safety concerns.

Throughout the MR recovery project in the Fall of 2000, Fritts voiced his frustrations with an abbreviated MR completion schedule and insufficient resources to his supervisors. He also complained

that he had "too many bosses" to perform his work effectively. In his testimony, Complainant stated that he was concerned that the quality of the MRP would suffer and that the covered systems, structures and components would be in an unknown condition affecting plant safety and that he raised this concern with his supervisors. (Tr. 497). I find these voiced concerns to supervisors to also be protected activity.

Complainant issued a memorandum regarding what he believed to be an inadequate budget for the MR recovery project and lack of resources to "get the MR Program where it needs to be." (JX 65). This memorandum was sent to management on November 30, 2000. This memorandum does not implicate safety definitively and specifically. The memorandum does not address the safety implications of an inadequate budget or lack of resources and how they might lead to the violation of nuclear laws or regulations, or that safety was at risk. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292, 1296 (6th Cir. 1998). Inferences can be made that without sufficient monies and resources, Complainant would not be able to deliver a quality MR program. Without a quality MR program the plant would not be able to monitor its equipment as effectively. Without effective monitoring the plant would not be able to assess the availability and operability of its systems which could lead to a safety risk. However, Complainant does not allege that this is the case in the memorandum. He simply states that he needs an adequate budget and adequate resources. Therefore, I find in issuing the November 30, 2000 memorandum, Complainant did not engage in a protected activity.

On several occasions, Complainant alleges he requested management approval to expand the log review for data collection in creating the MR access database. The MR access database program was extended to encompass three years of log reviews, instead of the original two year period, to evaluate Job Orders and Action Requests in addition to the Control Room Logs, and to reconstruct the database. (Tr. 1437). Fritts testified that he suggested the expansion to a three-year review, to encompass Job Orders and Action Requests, and to acquire additional, qualified personnel. (Tr. 457-58, 510, 514). However, he also testified that he participated in the joint decision to expand the review to three years and include the other logs and that the decision to do both was Thornsberry's. (Tr. 819). Thornsberry, Lacey and Ebright testified that it was Thornsberry who assigned Springman to perform an audit of the collected data and from the audit results suggested to Lacey that the log reviews should be expanded. (Tr. 791-92, 1075, 1184, 1437, 1441-42, 1520-22). Lacey then directed the suggested expansions and ordered additional personnel. (Tr. 798-99, 1437, 1522). I am persuaded that the evidence of record supports a finding that Thornsberry was the catalyst for the expansion of the log reviews to include a three-year review and Job Orders and Action Requests. Therefore, while the suggestions may

be considered protected, Thornsberry's adoption of them negates any meaningful connotations.

Regarding database reconstruction, Complainant took the MR access database out of commission to correct deficiencies in the program on December 6, 2000. (Tr. 580-85). Fritts testified that this was necessary because the database program was not operating effectively and "was very confusing to the System Managers," who required its use. (Tr. 581). In addition, the System Managers had voiced their complaints to Fritts about the system. (Tr. 483). He expressed the reasons for this action to Lacey and Ebright on the evening of December 5, 2000. (Tr. 580). Shutting down the MR access database to "debug" it and to end System Manager confusion, without more, lacks a sufficient nexus to safety concerns. Fritts has not shown that when expressing his concerns about the database program to his supervisors that he also declared that these problems would lead to the violation of nuclear laws or regulations, or that safety was at risk. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Therefore, I find that Complainant's actions regarding the MR access database program on December 5 and 6, 2000, were not protected activities.

Nexus Between Protected Activity and Adverse Action

A complainant need not have direct evidence of discriminatory intent since ERA employee protection cases may be based on circumstantial evidence of that intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 95-ERA-40(ARB June 21, 1996). Rarely will a whistleblower case record contain testimony by a member of management which would support a finding of linkage between the protected activity and the adverse employment action. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id*. at 5.

Retaliatory intent may be expressed through "ridicule, openly hostile actions or threatening statements." *Id*. at 5. In determining whether retaliation has taken place, it is also relevant to look at past practice of the employer to determine whether there has been disparate treatment.

The Complainant has proven by a preponderance of the evidence, that he engaged in protected activity under the Act. That Complainant suffered an adverse employment action was uncontested. Finally, Complainant must demonstrate that his protected activity was a contributing factor in the adverse action that he suffered.

Fritts argues on brief that his protected activity contributed to Respondent's adverse employment decision as illustrated by: (1) The temporal proximity of Complainant's protected activity and the adverse employment action; (2) Respondent deviated from established termination procedures when terminating Complainant; (3) Complainant was treated differently than other Tier III personnel; and (4) Complainant's supervisors expressed their displeasure with his protected activities through threats, tone of voice and body language.

1. Temporal Proximity

Temporal proximity of the adverse action and the employer's learning of the complainant's protected activity is a factor to consider in establishing a *prima facie* case. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). As discussed above, the question of a *prima facie* case is irrelevant at this point in the proceedings. However, I address the question of temporal proximity as circumstantial evidence of discrimination.

Although temporal proximity may be a factor in establishing causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exits. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB July 30, 1996); *Tracanna v. Arctic Slope Inspection Service*, ARB 1997-WPC-1 (ARB July 31, 2001).

As I have found Fritts' December 5 and 6, 2000 activities to be unprotected, the December 8, 2000 termination date becomes more remote and less significant. In addition, Fritts' poor performance evaluation antedates even his established initial protected activity. Concurrent with his protected activity are contemporaneous notations in the MARC file made by Ebright and memoranda from others working with Complainant describing Complainant's poor performance. In Fritts' MARC file, Ebright recorded Complainant's poor communication skills and lack of professionalism throughout the Fall of 2000. (JX 1 at 26, 39, 41, 45, 47, 48, 49, 51, 55, 57, 64, 81). Ebright relieved Fritts of his supervisory duties over the Preventative Maintenance and Predictive Maintenance programs by September 12, 2000, and removed him as head of the MRP on October 12, 2000. (JX 1 at 26, 55). Thornsberry issued a memorandum to Ebright regarding Fritts' poor communication skills and lack of professionalism. (JX 1 at 58). Lacey also sent Ebright a memorandum regarding Fritts' poor performance and non-compliance with procedures. (JX 1 at 67).

Garner's memorandum to Ebright referred to an assignment, originally given to Fritts, which had to be reassigned as Fritts had not started it. In addition, Springman and Shane Lies issued memoranda regarding their frustration in communicating with Fritts concerning the MR access database. (JX 1 at 76, 98). Based upon an evaluation of the entire sequence of events, I conclude that temporal proximity of the adverse action to the protected activity does not give rise to an inference of discriminatory intent.

2. Termination Procedures

Complainant also alleges that Respondent did not follow termination procedures as he received no warning of his impending termination and a MARC checklist was not employed in termination. Complainant signed his personal PAR Action Plan on September 16, 2000. (JX 1 at 7). The four-page document contained a section entitled "Expectations," which informed Complainant that:

> You are expected to improve your performance to a level that "Consistently Meets Standards" in every Effectiveness Standard. Slight or sporadic changes are unacceptable. Sustained performance at a level that "Consistently Meets Standards" is the outcome *necessary for continued employment* at AEPNG. *Failure to improve and sustain acceptable performance will result in termination*.

(JX 1 at 6)(emphasis added). In addition to the language of the PAR Action Plan, Complainant had several conversations with Ebright in which Ebright counseled him about performance issues and his need for improvement. (JX 1). Therefore, I find that Complainant had warning that his employment was in jeopardy from the date of his signature on the PAR Action Plan which was September 16, 2000.

Fritts makes multiple arguments on brief concerning the timing of the termination. He contends that he was succeeding in his PAR Action Plan and that his termination was the result of a "snap" decision made on December 6, 2000 due to his protected activity. (Complainant's Brief at 81-96). He asserts that Respondent did not follow the proper procedures in his termination. (Complainant's Brief at 82-96). Thornsberry was not told of Complainant's termination until after the fact. Fritts argues that this is an indication of the impulsive nature of the termination decision. In addition, he suggests that a MARC checklist was not used in his termination whereas they were used with other employees, including the termination of Dominic So. Furthermore, Fritts argues that the PAR Action Plan allowed for a ninety-day period and his termination occurred one week before the expiration of the ninety-day period.

Fritts also contends that his Tier III rating was invalid and that the raters did not take into account the bonus he had received in the Spring of 2000. Believing the bonus to be merit-based, Fritts argues that it should have been considered in his PAR evaluation. In addition, he argues that had management made the decision for termination earlier, he would not have been invited to the Engineering Programs Christmas party as the e-mail invitation was sent by Ebright's secretary.

Regarding the termination procedures, Bossinger, who was the Human Resources Manager, testified that termination procedures were followed. (Tr. 1694-1708). Respondent asserts that the decision to terminate Complainant was made on October 26, 2000. On that date, Ebright met with Godley and Lacey to discuss Complainant's performance and all acknowledged that termination was imminent as he had not made "immediate and sustained" improvement as required by his PAR Action Plan. After discussing Complainant's performance with Lacey and Godley, Ebright sought guidance from Bossinger and Morrison. Ebright collected the proper information and allowed Bossinger and Morrison to review it. He then forwarded the same information onto Bakken, Godley, Lacey and Rencheck who reviewed it and concurred in the recommendation of termination. (JX 13). Bossinger testified that the consensus of these parties was required for Complainant's termination and that a MARC checklist was unnecessary in a termination based upon failure in a PAR Action Plan. (Tr. 1694, 1700).

I find that the decision to terminate Complainant was made on October 26, 2000. Respondent's chronology of the events leading up to Fritts' termination was supported by the testimonies of Ebright, Lacey, and Bossinger, whom I found entirely credible witnesses. That Thornsberry was not informed of Complainant's termination in advance is of no moment since his termination would be effective only with the consensus of Bakken, Rencheck, Godley, Bossinger, Lacey, and Ebright. Thornsberry's assent was not required for termination. Furthermore, I am persuaded by Respondent's contention that MARC checklists were not required in a termination for unsuccessful PAR Action Plan employees since the lists were related to a separate program used for other distinct purposes. Fritts' attempt to categorize the bonus as being merit-based has also previously been rejected. The record shows that the bonus was paid to many employees for overtime work. Finally, I find no relation between the mass e-mail Christmas party invitation and the termination decision date. Complainant offers no evidence other than naked speculation to demonstrate Employer's termination decision date. The e-mail was sent to all personnel included in the Engineering Programs distribution list and was not addressed to Fritts personally. The record contains no evidence to support a finding that this e-mail invitation indicates a December 6, 2000 termination decision. Therefore, I conclude that Respondent did comply with the applicable termination procedures.

3. Disparate Treatment

In whistleblower protection claims, a disparate treatment violation is proven when an individual is shown to have been singled out and treated less favorably than others similarly situated as a result of protected activity. *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002)(citing *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 347 (3d Cir. 1990).

On brief, Complainant argues that this is a case in which he received disparate treatment as a result of engaging in protected activity. (Complainant's Brief at 114-123). However, this record will not support that finding. Fritts fails in his attempt to establish the way in which he was treated differently. Differential treatment is a prerequisite for success in using this argument. *Doyle v. Secretary of Labor*, 285 F.3d 243, 253 (3d Cir. 2002); *Pierce v. Commonwealth Ins. Co.*, 40 F.3d 796, 801-02 (6th Cir. 1994); *Tracanna v. Arctic Slope Inspection Serv.*, 97-WPC-1 (ARB July 31, 2001). In support of his argument, Fritts offers comparison to two other I&M employees in the MRP and also statistical evidence.

Fritts has provided no evidence that Kalinowski engaged in any protected activity, nor is there evidence that he was a similarly situated employee. He merely asserts that Kalinowski was a Tier III rated employee and was demoted rather than fired. Respondent has offered evidence to demonstrate that Kalinowski was successful in his Tier III program and that demotion was justified. Ebright sent a memorandum to Human Resources to update the progress of Tier III and IV rated employees under his supervision. (JX 1 at 144). Ebright reported that Kalinowski was successful in his PAR Action Plan. The record establishes that Kalinowski was demoted prior to his Tier III rating. (Tr. 897). Thus, neither success nor failure in his 2000 PAR Action Plan played a role in Kalinowski's demotion. The record also establishes that Kalinowski was successful in his PAR Action Plan subsequent to his Tier III rating and so termination was not warranted. (JX 144). Based upon the record, I cannot make a finding that Kalinowski was a similarly situated employee who was treated differently from Fritts because of his protected activity.

Regarding Fritts' attempted comparison to the treatment of Dominic So, he has established that So may have engaged in protected activity, by issuing Condition Reports regarding the operability of the Air Operated Valves, but has failed to establish how this relates to his alleged disparate treatment. Fritts suggests that he should have been transferred to another assignment at the end of his unsuccessful PAR Action Plan as was So. So was a Tier III rated employee who was unsuccessful in his PAR Action Plan, but he was transferred to the Licensing Renewal Group after

the initial ninety-day PAR Action Plan period instead of being terminated. The record reveals a difference between Fritts' employment situation and that of So's. When confronted with the termination packages of Complainant and So, Rencheck remembered that So had success in a previous assignment and he refused to concur in the termination action but suggested reassignment. However, Rencheck did concur in the termination recommendation of Fritts. The record is unclear as to how the work record or discipline of So was comparable to Fritts' situation. Therefore, I cannot make a connection between Dominic So's treatment by I&M and Complainant's disparate treatment claim.

Fritts also asserts that he was the only member of the MR recovery project team to suffer termination. Thornsberry was also a Tier III rated employee assigned to the MR recovery project team and was Complainant's supervisor from mid-October to December. Thornsberry replaced Fritts as the head of the MRP on October 12, 2000. Fritts alleges that although neither he nor Thornsberry were able to complete the MRP before the restart of Unit 1, only Fritts was terminated. However, Complainant offered no evidence to demonstrate that Thornsberry was similarly situated. Respondent produced evidence establishing that Thornsberry was successful in his PAR Action Plan. (Tr. 1559-60, 1601). That gives good reason for distinguishing his treatment from that of Complainant.

Finally, Complainant's statistical evidence offers no support for his position. At the conclusion of the 2000 PAR evaluation, seventy-six employees were rated Tier III and forty were rated Tier IV. (Tr. 1683). Of the seventy-six Tier III employees, sixty-two successfully completed their Action Plans. Of the fourteen remaining employees, twelve voluntarily left Cook and two, Fritts and So, were involuntarily terminated. (Tr. 1690). Of the forty Tier IV employees, nine were successful in their Action Plans. (Tr. 1683). The thirty-one unsuccessful Tier IV employees either elected voluntary severance or were terminated involuntarily. (Tr. 1691). Although only two out of seventy-six Tier III employees were terminated involuntarily, the termination offers evidence of disparate treatment without a comparison of employment records. The record contains no evidence to demonstrate how any of the employees represented in the statistical evidence were similarly situated to Fritts other than the PAR evaluation rating. Fritts has introduced insufficient evidence to support a finding of disparate treatment through an analysis of incomplete statistical data.

In sum, I find that Complainant has not demonstrated that he received disparate treatment for engaging in protected activities.

4. Hostile Supervisors

Finally, Complainant also argues that his supervisors expressed hostility towards him because of his protected activities evidenced through threat, tone of voice and body language.

Complainant argues that the NRC required that the MRP be brought into compliance prior to the restart of the Unit 1 reactor. He suggests that his concerns addressing quality and scheduling that could delay reaching compliance, and therefore delay restart, resulted in the hostility he allegedly received from Ebright, Lacey and Thornsberry. (Tr. 405-07). The NRC was aware that I&M would be restarting Unit 1 before bringing the MRP into compliance. (JX 162). Complainant asserts that Ebright told him that both of their jobs depended on MR completion before the restart of Unit 1. Complainant has not established the relationship between this comment and his protected activity. Complainant testified that this threat was made "at least three times," but that Ebright never yelled or raised his voice. (Tr. 414, 827-29, 831). Ebright testified that he never made such a statement and denied that Complainant's job was conditioned on timely MR completion. (Tr. 1176). Ballon, Dixon, Ebright, Lacey and Thornsberry all testified that Unit 1 restart was not conditioned on MR program compliance. (Tr. 225, 328-29, 1172-74, 1179, 1451, 1599-1600). Although Fritts and So testified that it was their understanding that MR compliance was a condition of Unit 1 restart, Unit 1 was restarted in December 2000 and the MR program was not brought into compliance until the Spring of 2001. (Tr. 140, 687). I conclude that the evidence supports a finding that the restart of Unit 1 was not conditioned upon bringing the MR program into compliance with the NRC regulations.

In addition, Complainant's assertion that Ebright and Lacey's negative responses to his protected activities as evidenced by tone of voice and body language is far too nebulous to support a finding of discriminatory intent. Cook was in a stressful, hurried restart environment during this time. Ebright, Lacey, Thornsberry and Gebbie all testified that time extensions on the MRP were not celebrated, but accepted under a duty to "do the right thing...what had to be done." (Tr. 927). Complainant's subjective assertions of hostility from his supervisors comprise the only evidence of record of such hostility. Complainant did not record these hostilities in his personal notebook and the assertions were not substantiated by his own witnesses. Although I found Fritts to be a credible witness, the record supports a finding that Fritts misinterpreted his supervisors' motives. During the Fall of 2000, the plant was in a highly-stressful restart environment and the testimonies of Ebright, Lacey, and Thornsberry support a finding that their attitudes were influenced by the stressful environment. Fritts was not successful in performing his responsibilities and that fact may have contributed to any negative responses. I find

that Complainant has not demonstrated that he faced hostility or retaliatory conduct by his supervisors as a result of his protected activities.

In sum, Complainant has failed to prove by a preponderance of the evidence that his protected activity contributed to the adverse employment action. I reject Complainant's argument that the temporal proximity of the adverse action and Respondent's learning of Complainant's protected activity give rise to an inference of discriminatory intent. I find that Respondent established a legitimate intervening basis for the adverse employment action by demonstrating Complainant's poor performance record. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB July 30, 1996); *Tracanna v. Arctic Slope Inspection Service*, 1997-WPC-1 (ARB July 31, 2001). I reject Complainant's argument that Cook management did not follow proper termination procedures, evidencing discriminatory intent. Respondent produced entirely credible witnesses to attest to the termination procedures existing at I&M at the time of Fritts' employment and evidence to demonstrate that I&M complied with those procedures. I reject Complainant's argument that he received disparate treatment as a result of engaging in protected activity. The evidence of record does not demonstrate that Fritts was treated differently than similarly situated employees. *Doyle v. Secretary of Labor*, 285 F.3d 243, 253 (3d Cir. 2000); *Pierce v. Commonwealth Ins. Co.*, 40 F.3d 796, 801-02 (6th Cir. 1994). Finally, I have also rejected Complainant's argument that his supervisors expressed hostility towards him due to his protected activities. Complainant has simply not demonstrated by a preponderance of the evidence that his protected activity was a contributing factor to his termination. *See* 42 U.S.C. §5851(b)(3)(C); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995). Accordingly, this claim should be denied.

Respondent's Burden

Even if Complainant had proved by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment decision, he would not succeed in his claim as Respondent has shown by clear and convincing evidence that it would have terminated Fritts due to poor performance.

Respondent details an employment history of Fritts that is less than stellar. Almost three months prior to the first of Fritts' protected activities, he was admonished by the Vice-President of Engineering for unprofessional behavior and was warned to correct his behavior in order to "prevent future disciplinary action." (JX 1 at 8). Slightly less than a month prior to the first of Fritts' protected activities, he received a Tier III performance rating. (JX 1). This rating required Fritts to show immediate and sustained improvement within a ninety-day period to

retain his employment with I&M. (JX 7). On September 12, 2000, Ebright relieved Fritts of his supervisory control over the Predictive Maintenance and Preventative Maintenance programs. (JX 1 at 26). This occurred was in response to Fritts' complaint that he had too many responsibilities to effectively communicate with management regarding the progress of the Maintenance Rule. (JX 1 at 26, Tr. 1018-19). On September 16, 2000, Fritts received his personalized PAR Action Plan which detailed the shortcomings of his work performance and directed a course of conduct required to succeed in the Action Plan. (JX 1). The Action Plan, which was created based on the PAR evaluation, detailed the deficiencies in Fritts' performance as a supervisor in the areas of communication and leadership/initiative. (JX 1). From October 9 to 12, 2000, it was discovered that the data being collected for input into the MR access database was unreliable. The record supports the finding that Thornsberry and Springman were instrumental in this discovery. Ebright noted in Fritts' MARC file that Fritts was aware that the data was unreliable but had not taken steps to correct it. The end result was that three weeks of work in data collection had to be discarded and redone. (JX 1 at 50). Following this event, Ebright removed Fritts as the head of the MRP although he did retain administrative supervisory duties. Two weeks later, Ebright met with Godley and Lacey to discuss the possibility of termination of Fritts. (JX 1 at 64).

Respondent asserts that Fritts was terminated due to failure to complete his PAR Action Plan. Fritts did not demonstrate immediate and sustained improvement and did not complete the requirements of his Action Plan.

Fritts' Action Plan allowed for a ninety-day period to show improvement. This period began on September 16, 2000, when he received and signed his personalized Action Plan. (JX 1). Communication, leadership and initiative were the chief problem areas identified in the Action Plan. Regarding communication, the record reveals that Fritts did not make improvements in this area. Ten days after signing the Action Plan, Fritts attended a meeting with the NRC residents in which he interrupted and argued with the NRC senior resident and became very defensive about the progress of the MRP. (JX 1 at 39). Ebright documented Fritts' behavior at other NRC meetings in which he misrepresented information and gave the NRC the "wrong message." (JX 1 at 47, 81; JX 168 at 41-42). The record also contains several accounts from Fritts' supervisors stating that Fritts was not keeping them informed of the status of the MRP as dictated by his Action Plan. (JX 1 at 41, 54-55, 66-67). Although Fritts' Action Plan required him to submit bi-weekly reports to Ebright, Ebright received only one bi-weekly report. (Tr. 983, JX 107). In addition, Springman e-mailed Fritts and Fritts' supervisors, in part, referring to his frustration with "Craig's inability to hear what I say." (JX 1 at 76).

Regarding leadership and initiative, the record reveals several instances of unprofessional behavior and failure to take responsibility for problems arising under the MRP. As discussed above, Fritts did not behave appropriately at several meetings with the NRC. Furthermore, Fritts was to give a presentation at an October 17, 2000 meeting. He missed the meeting and did not arrange for another individual to replace him. (JX 1 at 56). Thornsberry sent a memorandum to Ebright detailing an event in which Fritts neglected to arrange a training session until the last minute to the detriment of a group of System Managers. (JX 1 at 58). Garner also sent a memorandum to Ebright to inform him that a project originally given to Fritts had to be reassigned as Fritts had not even begun the project after two weeks. (JX 1 at 69). In Fritts' MARC file, Ebright made notes referring to Fritts' defensive reaction to criticism and his inability to take responsibility for problems arising with the MRP.

In sum, I conclude that Respondent has proven by clear and convincing evidence that even if Complainant's protected activity was a contributing factor in the adverse employment action that it would have terminated Complainant for unsuccessful completion of his Action Plan due to a lack of improvement in his performance.

CONCLUSION

It is my conclusion that Craig H. Fritts was not disciplined, discriminated against, or discharged for any activities protected by the Act.

RECOMMENDED ORDER

I recommend that Craig H. Fritts' claim for reinstatement and money damages be DENIED.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29

C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9 as amended by 63 Fed. Reg. 6614 (1998).